Coal Rush Mining, Inc. *and* United Mine Workers of America, District 17, Local 7604, AFL–CIO. Case 9–CA–40385

January 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has withdrawn its answer to the complaint. Upon a charge filed by the Union on July 23, 2003, the General Counsel issued the complaint on September 29, 2003, against Coal Rush Mining, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. On October 8, 2003, the Respondent filed an answer to the complaint. However, by letter dated November 26, 2003, the Respondent withdrew its answer.

On December 5, 2003, the General Counsel filed a Motion for Default Judgment with the Board and a memorandum in support. On December 10, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was filed within 14 days of service, all the allegations in the complaint would be considered admitted. Although the Respondent filed an answer to the complaint, it subsequently withdrew its answer. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true.[1]

Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the operation of a strip mine near Oceana, West Virginia, as contractor for Pioneer Coal, a subsidiary of Riverton Mining Company.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations described above, performed mining services valued in excess of $50,000 for Pioneer Coal, which, in turn, during the same period, sold and shipped coal valued in excess of $50,000 from its West Virginia facilities directly to customers located outside the State of West Virginia. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that United Mine Workers of America, District 17, Local 7604, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Gary Wayne Johnson has held the position of the Respondent's president and has been a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all material times, the employees of the Respondent described in article I of the National Bituminous Coal Wage Agreement of 1993 (the unit) have constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Since about June 18, 1998, the Union has been the designated exclusive collective-bargaining representative of the unit, and since then the Respondent has recognized the Union as that representative. This recognition has been embodied in a Memorandum of Understanding dated December 30, 2002.

Since about June 18, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about June 18, 1998, by virtue of the conduct described above, the Respondent and the Union have been parties to the National Bituminous Coal Wage Agreement (Agreement) of 1993.

Since about March 19, 2003, the Respondent has failed to continue in full force and effect all the terms and conditions of the Agreement by failing to provide unit employees with the required medical insurance benefits and to pay the insurance claims of the unit employees pursuant to the provisions of article XX of the Agreement, as incorporated by the parties' December 30, 2002 Memorandum of Understanding.

On March 19, 2003, the Employer laid off its employees without notice to or bargaining with the Union as required by article 17, section C of the Agreement.

The Respondent engaged in the conduct described above without the Union's consent. The terms and conditions of employment set forth above are mandatory subjects for the purpose of collective bargaining.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[2]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide medical insurance benefits to unit employees pursuant to article XX of the collective-bargaining agreement, we shall order the Respondent to restore the unit employees' medical insurance coverage and reimburse the employees for any expenses ensuing from the Respondent's failure to make required payments and to pay the insurance claims of employees, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally laying off unit employees, we shall order the Respondent to offer the laid-off employees full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent shall also be required to remove from its files any and all references to the unlawful layoffs, and to notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

[2] In its letter to the Region withdrawing its answer, the Respondent stated that it failed to provide the contractual medical benefits "because it was financially unable to make the required payments." It is well settled that an employer's inability to pay is not a defense to an 8(a)(5) allegation. See, e.g., *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989).

ORDER

The National Labor Relations Board orders that the Respondent, Coal Rush Mining, Inc., Oceana, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with United Mine Workers of America, District 17, Local 7604, AFL–CIO, as the collective-bargaining representative of the Respondent's employees described in article I of the National Bituminous Coal Wage Agreement of 1993, by failing to provide unit employees with medical insurance benefits and to pay the employees' insurance claims pursuant to article XX of the agreement and by laying off its employees without notice to or bargaining with the Union as required by article 17, section C of the agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the unit employees' medical insurance benefits and reimburse the employees for any expenses ensuing from the Respondent's unilateral failure to make contractually required medical insurance payments and to pay the employees' insurance claims since about March 19, 2003, with interest, as set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, offer the employees laid off on about March 19, 2003, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights or privileges previously enjoyed.

(c) Make whole the laid-off unit employees for any loss of earnings and other benefits suffered as a result of their unlawful layoffs, with interest, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful layoffs and, within 3 days thereafter, notify the laid-off employees in writing that this has been done and that the layoffs will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Oceana, West Virginia, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 30, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit or protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with United Mine Workers of America, District 17, Local 7604, AFL–CIO, as the collective-bargaining representative of our employees described in article I of the National Bituminous Coal Wage Agreement of 1993, by failing to provide unit employees with medical insurance benefits and to pay the employees' insurance claims pursuant to article XX of the agreement and by laying off our employees without notice to or bargaining with the Union as required by article 17, section C of the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the unit employees' medical insurance benefits and reimburse the employees for any expenses ensuing from our unilateral failure to make contractually required medical insurance payments and to pay the employees' insurance claims since about March 19, 2003, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer the employees laid off on about March 19, 2003, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights or privileges previously enjoyed.

WE WILL make whole the laid-off unit employees for any loss of earnings and other benefits suffered as a result of their unlawful layoffs, with interest, in the manner set forth in the remedy section of this decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful layoffs and, within 3 days thereafter, notify the laid-off employees in writing that this has been done and that the layoffs will not be used against them in any way.

COAL RUSH MINING, INC.